Supreme Court, U.S.
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No. 96-8986

In The

Supreme Court of the United States

October Term, 1996

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal prisoner who demonstrates that he is incarcerated for conduct that this Court conclusively determined does not constitute a federal crime has made "a substantial showing of the denial of a constitutional right" warranting issuance of a certificate of appealability under 28 U.S.C. § 2255.

2. Whether a defendant's failure to raise an argument on direct appeal, when that argument was foreclosed by binding circuit precedent and had been uniformly rejected by other circuits, constitutes a knowing and intelligent "waiver," precluding any showing of "cause and prejudice" or other excuse for the procedural default in a collateral review proceeding.

3. Whether a defendant who possesses a firearm and drugs in close proximity to each other, but neither bears the firearm on his person, nor otherwise transports it, commits the crime under 18 U.S.C. § 924(c) of "carr[ying]" a firearm "during and in relation to" the predicate offense of possession of the drugs with intent to distribute them.

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BRIEF FOR FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION (FAMM) files this *amicus* brief pursuant to this Court's Rule 37.2(a) in support of Arnold Hohn's petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.[1] Both petitioner and respondent have granted *amicus* consent to file this brief, and letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICUS

FAMM is a nonprofit, nonpartisan, educational organization that conducts research and advocacy regarding the cost of mandatory minimum sentencing in terms of public expenditures, perpetuation of unwarranted and unjust sentencing disparities, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has over 33,000 members nationwide with 30 chapters in 24 states and the District of Columbia. FAMM conducts sentencing workshops for

[1] Counsel for neither party authored this brief in whole or in part. No person or entity, other than the *amicus* FAMM, made a monetary contribution to the preparation or submission of this brief.

its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for *pro bono* litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime.

FAMM is deeply concerned about the injustice wrought by the mandatory minimum statute under which Arnold F. Hohn was convicted, 18 U.S.C. § 924(c). Before *Bailey v. United States*, 116 S. Ct. 501 (1995), untold hundreds of prisoners received mandatory five-year sentences for lawful conduct. Prisoners such as petitioner Hohn remain incarcerated; others, like Herman McGee, have found courts responsive to their plight. *United States v. Herman McGee*, No. 90-137CR(3) (E.D. Mo.). Mr. McGee lawfully kept five guns in his home when he was arrested for cocaine. Although no drugs were found and no evidence suggested the guns were used or carried or connected to the cocaine offense, Mr. McGee was convicted of violating § 924(c) and sentenced to five consecutive five-year sentences. The district court judge questioned, as have most federal judges, the wisdom of shifting sentencing discretion from the judiciary to the prosecution. After this Court handed down *Bailey*, Mr. McGee's conviction was vacated and his sentence reduced by twenty-five years. FAMM submits this brief on behalf of all prisoners still serving mandatory minimum sentences for conduct that is not a crime.

SUMMARY OF ARGUMENT

A federal prisoner whose motion to vacate sentence under 28 U.S.C. § 2255 has been denied is entitled to appeal if a single district or circuit judge, or the Circuit Justice, finds that the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).[2] The circuit court below wrongly concluded that petitioner had not made such a showing, despite his conviction under 18 U.S.C. § 924(c) for conduct this Court held in *Bailey v. United States*, 116 S. Ct. 501 (1995), did not violate that statute.

Petitioner's *pro se* § 2255 motion, liberally read, presented the claim that petitioner was convicted without proof beyond a reasonable doubt (or, indeed, any proof at all) that he was guilty of violating § 924(c), properly construed. Thus, that motion presented a constitutional claim that was cognizable on federal collateral attack.

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[2] Although the petitioner has not raised this point, the statute entitled him to a certificate of appealability by virtue of Judge McMillian's dissenting vote. Section 2253(c)(1) states that the appeal may proceed if *"a* circuit justice or judge" issues a certificate of appealability, not the court itself or a three-judge panel; *compare* 28 U.S.C. § 2244(b)(3)(B) (under same Act, authorization for permission to file second or successive petition must be granted by "a three-judge panel of the court of appeals"). Congress's choice of different language for different provisions of the AEDPA is determinative of its intent to create a different meaning. *Lindh v. Murphy*, 138 L. Ed. 2d 481 (1997). While a Circuit may chose to assign such motions to three-judge panels, *see In re Burwell*, 350 U.S. 521, 522 (1956), the court cannot thereby repeal the petitioner's right to appeal with the permission of a single judge. *See* 4th Cir. R. 22(a); proposed 3d Cir. R. 22.3 (adopting this reading).

Jackson v. Virginia, 443 U.S. 307 (1979); *cf. Davis v. United States*, 417 U.S. 333 (1974). His showing in support of that claim was, to say the least, "substantial." The decision below refusing him any right to appeal from the erroneous denial of his § 2255 motion is based on a simple but grievous mistake in identifying the constitutional right at issue. This Court should grant certiorari and reverse.

The Eighth Circuit's refusal to hear petitioner Hohn's appeal stacks injustice upon injustice. The district court decision that is insulated from appellate review is premised upon an absolute "waiver" rule that the Eighth Circuit would now renounce. The district court in this case denied § 2255 relief on the basis that petitioner Hohn "waived" his *Bailey*-based claim by not raising it on direct appeal. The district court did not consider that "waiver" to be a procedural default that could be excused on the basis of "cause and prejudice," as it should have under this Court's cases. *United States v. Frady*, 456 U.S. 152 (1982); *Davis v. United States*, 411 U.S. 233 (1973). The Solicitor General has confessed that this approach, taken in this and other Eighth Circuit cases, is indefensible. *See* Brief for the United States, *Bousley v. Brooks*, No. 96-8516 (filed June 6, 1996). Above all, the district court's decision is groundless because it explicitly rests upon overturned law. After vacatur and remand by this Court, the Eighth Circuit reversed its decision that announced the absolute "waiver" rule. *United States v. McKinney*, 79 F.3d 105 (8th Cir. 1996), *vacated*, No. 96-6348, 1997 U.S. LEXIS 3099 (U.S. May 19, 1997), *on remand*, No. 95-2132, 1997 U.S. App. LEXIS 17912 (8th Cir. July 16, 1997).

ARGUMENT

1. Conviction without proof beyond a reasonable doubt of each element of the offense of conviction, properly construed, is a due process violation, cognizable on federal collateral attack and appealable under 28 U.S.C. § 2253(c).

Petitioner Hohn was convicted after trial of violating 18 U.S.C. § 924(c) without any evidence, much less proof beyond a reasonable doubt, that he "used or carried" a firearm "during and in relation to" a drug trafficking offense. *See Bailey v. United States*, 116 S. Ct. 501 (1995) (authoritatively construing § 924(c) as not penalizing conduct forming the basis of petitioner Hohn's conviction). Were it to reach the issue, the Eighth Circuit itself would certainly conclude that petitioner Hohn was wrongfully convicted. *United States v. McKinney*, No. 95-2132, 1997 U.S. App. LEXIS 17912, at *5 (8th Cir. 1997) (stating that having gun available for immediate use does not constitute using or carrying).

Yet after petitioner's motion under 28 U.S.C. § 2255 to vacate that conviction was denied, the Eighth Circuit refused a certificate of appealability, reasoning that:

> [T]he petitioner is not making a constitutional claim: He is making a claim to federal statutory right. *Bailey* did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution. The Constitution does not guarantee that judges will always be right. It does guarantee, it is true, that persons accused of crimes will receive due process; but the petition makes no due process claim with respect to the trial judge's actions, and trial errors hardly

ever rise to the level of a due process violation in any case.

Hohn v. United States, 99 F.3d 892, 893 (8th Cir. 1996) (per curiam). The Eighth Circuit thus misconstrued petitioner Hohn's constitutional claim.

Petitioner was not trying to manufacture a constitutional claim out of a statutory violation by asserting that judicial error is a *per se* violation of due process. His claim is that misconstruction of the statute at his trial led to his conviction without proof of guilt, which is a genuine due process violation. All sufficiency-of-the-evidence analysis necessarily rests upon prior statutory construction of the elements of the offense, but the ultimate question of sufficiency is no less a constitutional question on that account. *See, e.g., United States v. Kozminski*, 487 U.S. 931, 953 (1988) (considering whether record contains sufficient evidence of offense, as newly construed in that case, as basis for deciding whether to remand for new trial or for judgment of acquittal); *cf. Hudson v. Louisiana*, 450 U.S. 40 (1981); *Burks v. United States*, 437 U.S. 1 (1978).

Conviction without proof of every element of the offense, properly construed, violates the Fifth Amendment Due Process rights of federal defendants, just as it violates the Fourteenth Amendment Due Process rights of state defendants. *In re Winship*, 397 U.S. 358 (1970). As required by the Constitution, the burden of proving beyond a reasonable doubt every element of the charged offense, as defined by state or federal law, rests upon the prosecution. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Violations of this fundamental principle, if not corrected on direct appeal, are cognizable in petitions for federal

habeas corpus, whether by state or federal prisoners, because they work a denial of a constitutional right – the right to due process of law. *Jackson v. Virginia*, 443 U.S. 307 (1979).

The court below entirely overlooked this basic and simple point (perhaps because it elected to interpret a new statute without the benefit of adversarial briefing). Instead, it ruled that a prisoner advancing such a claim is complaining only of "an incorrect application of a statute. . . . " *Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1996). Another Circuit has expressed possible agreement with the decision below, indicating that the Eighth Circuit's decision is not the kind of merely-erroneous precedent that inevitably crops up and must sometimes be ignored; rather, it threatens to become influential. *See United States v. Eyer*, 113 F.3d 470, 474 (3d Cir. 1997) (dictum).[3] This Court should grant the petition to clarify that a conviction on evidence insufficient to prove each element is unconstitutional, even though a court must first construe the statute so as to know what the elements are and how they can be proven. *Kozminski*, 487 U.S. at 953.

Even if it could be said that the petitioner is incarcerated in violation of the statute rather than the Constitution, this statutory violation creates a "complete miscarriage of justice" and is therefore "subject to collateral attack." *Davis v. United States*, 417 U.S. 333 (1974). Moreover, the contention that the prisoner's conviction

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[3] In *Eyer*, the government declined to urge the court of appeals to follow *Hohn*; the court therefore pretermitted the issue. *Eyer*, 113 F.3d at 474.

violates the statute hardly proves that his confinement is not unconstitutional as well – a point this Court did not have to reach in *Davis*. *See United States v. McPhail*, 112 F.3d 197 (5th Cir. 1997) (recognizing, on appeal from denial of § 2255 motion, that *Bailey* announced a non-constitutional rule, to wit, a statutory construction, but that as a result appellant's conviction was supported by insufficient evidence, requiring vacatur of conviction on that count).

For this reason, petitioner's application for a certificate of appealability should have been granted, regardless of how one construes the term "substantial showing of the denial of a constitutional right," as used in 28 U.S.C. § 2253.

2. A certificate of appealability must be granted if the appellant has made a "substantial showing of the denial of a constitutional right" with reference to an issue raised in the § 2255 motion or concerning the disposition of that motion.

In one way, the court below was correct: In asking whether petitioner had made a "substantial showing of the denial of a constitutional right," the court looked past the issue that petitioner would presumably have to raise on appeal to the issue actually presented in petitioner's § 2255 motion. The district court had not reached the merits of petitioner's § 2255 motion but had denied it on the basis that petitioner "waived" his *Bailey* claim by not raising it on direct appeal. Thus, the appeal that petitioner Hohn was seeking leave to pursue would no doubt have turned on whether an absolute "waiver" rule

applies in this situation, or whether, on the other hand, the failure to raise the issue on appeal presents a presumptive procedural default that must be overcome with a showing of "cause and prejudice."[4]

The denial of petitioner's § 2255 motion based upon this erroneous "waiver" rule itself enables petitioner to make a "substantial showing" of denial of his rights, but not of his constitutional rights. Thus, unless Congress carelessly employed the phrase "constitutional right" in § 2253(c) but really meant "federal right,"[5] discernment of the proceeding in which the statute requires the "substantial showing" determines appealability in petitioner's case. Although his constitutional rights were violated in the trial court by his improper conviction, the rights denied in the § 2255 case, at the district court level, were his statutory, procedural rights.

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[4] Not only has the Solicitor General conceded error on this issue, but the Eighth Circuit decision announcing the absolute "waiver" rule was vacated by this Court and reversed by the Eighth Circuit on remand. *See United States v. McKinney*, 79 F.3d 105 (8th Cir. 1996), *vacated*, No. 96-6348, 1997 U.S. LEXIS 3099 (U.S. May 19, 1997), *on remand*, No. 95-2132, 1997 U.S. App. LEXIS 17912 (8th Cir. July 16, 1997); Brief for the United States, *Bousley v. Brooks*, No. 96-8516 (filed June 6, 1996) (confessing error and recommending GVR).

[5] FAMM concurs with the petitioner and with *amicus* NACDL that the statute should be so construed. *See Hunter v. Bailey*, 101 F.3d 1565, 1571 (11th Cir. 1996); *Santana v. United States*, 98 F.3d 752, 757 (3d Cir. 1996).

Section 2253(c)(2), like so many other sections of the AEDPA, is not clear[6]: It does not state whether the required "substantial showing" was meant to refer to the issue(s) to be raised on appeal, or to the issue(s) on the underlying merits, or to either of them, or to both. Clearly, an appeal is equally worthy of going forward in any of these cases. This Court should resolve that question as well in its disposition of petitioner's case and note that a would-be appellant in a habeas or § 2255 matter "has made a substantial showing of the denial of a constitutional right" by demonstrating that such a violation occurred within the underlying criminal proceeding or within the disposition of the § 2255 motion (or § 2254 petition) itself.

In failing to make this point clear, the statute, as drafted, seems to incorporate the assumption that every appeal from the denial of a § 2255 motion will pursue the merits of the underlying claim. Since that often is not and cannot be the case, the Court should clarify that § 2253(c)(2) does not require that each issue raised on appeal present a question of constitutional law. *See United States v. Lozada*, 107 F.3d 1011, 1013 (2d Cir. 1997) (seemingly assuming that issue with respect to which showing must be made is issue to be raised on appeal); *United States v. Orozco*, 103 F.3d 389, 393 (5th Cir. 1997) (same).

To hold otherwise would bar prisoner appeals of such issues as whether the petition was sufficiently specific to withstand summary dismissal, or whether a certain

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[6] *See Lindh v. Murphy*, 138 L. Ed. 2d (1997) (discussing silk purses and pigs' ears).

kind of non-constitutional claim is cognizable in a § 2255 proceeding, or a denial of the right to counsel guaranteed by Fed. R. Gov. § 2255 Proc. 8(c), or the standard of harmless error, or whether there was a procedural default (or a basis for relief from any default, as in this case), or any of a host of other important issues. The statute does not compel such a result, and it should not lightly be assumed that Congress intended to insulate district court decisions from review, or to freeze the development of the law, to this radical extent.

In this case, petitioner has a "substantial" issue to raise on appeal concerning the denial of his § 2255 motion, which he was entitled to have a certificate to pursue, on either of two grounds. First, if "constitutional" means "federal" in § 2253(c)(2), he could appeal because he made a substantial showing that his federal (albeit non-constitutional) right to fair consideration of his § 2255 motion was wrongly denied through misapplication of the procedural default rule. Second, looking past the issue to be raised on appeal to the ultimate question about petitioner Hohn's conviction, he met every definition of a "substantial showing of the denial of a constitutional right," as discussed under Point 1 of this brief.

Nor does the district court's procedural rationale for dismissing the § 2255 motion present an alternate ground of affirmance. To the contrary, that disposition was as flagrantly wrong as that of the court of appeals, as both the Eighth Circuit and the Government would now concede. *See United States v. McKinney*, 79 F.3d 105 (8th Cir. 1996), *vacated*, No. 96-6348, 1997 U.S. LEXIS 3099 (U.S. May 19, 1997), *on remand*, No. 95-2132, 1997 U.S. App. LEXIS 17912 (8th Cir. July 16, 1997); Brief for the United

States, *Bousley v. Brooks*, No. 96-8516 (filed June 6, 1996), *supra*. As this Court has recognized, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

Indeed, the Solicitor General's confession in *Bousley* overlooks one of the two forms of "cause" for relief from the procedural default that exist in post-*Bailey* cases. Not only does petitioner have a good claim of innocence, giving rise to a "fundamental miscarriage of justice," *Schlup v. Delo*, 115 S. Ct. 851, 861 (1995); *Murray v. Carrier*, 477 U.S. at 496,[7] he also has cause for relief from default by virtue of the novelty of the *Bailey* ruling and its essential "unavailability" to attorneys in the Eighth Circuit in the face of controlling, adverse precedent. *Smith v. Murray*, 477 U.S. 527, 536-37 (1986) (discussing *Reed v. Ross*, 468 U.S. 1, 13-16 (1984)).

For all these reasons, as well as those discussed in the petition itself and by *amicus* NACDL, the petition for writ of certiorari should be granted.

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[7] *See also United States v. McKinney*, No. 95-2132, 1997 U.S. App. LEXIS 17912, at *8 (8th Cir. 1997) (holding that conviction of person who is not guilty of violating 18 U.S.C. § 924(c), as construed in *Bailey*, results in "miscarriage of justice").

CONCLUSION

For the foregoing reasons, to rectify a plain miscarriage of justice, this Court should grant the writ of certiorari, vacate the decision below, and summarily reverse the judgment with a *per curiam* opinion pointing out and correcting the grievous legal fallacies on which that decision is based.

Respectfully submitted,

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